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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5072

SHIRLEY DAVIS,

Petitioner,

—v.—

OTTO E. PASSMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5072

SHIRLEY DAVIS,

Petitioner,

-v.-

OTTO E. PASSMAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

INTEREST OF AMICUS[1/]

The American Civil Liberties Union (ACLU) is a non-partisan membership organ-

1/ Consents to the filing of a brief amicus curiae have been obtained from all parties and have been lodged with the clerk's office.

ization of over 200,000 persons devoted to the protection of rights secured by the United States Constitution. The decision of the en banc majority of the Fifth Circuit in this case poses a threat to the power of Federal courts to utilize traditional judicial remedies in order to vindicate constitutional rights. Since constitutional rights without adequate remedies are a mere form of words, the ACLU submits this brief amicus curiae in support of the historic remedial power of Article III courts.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

In 1974, Shirley Davis worked for Congressman Otto E. Passman in his Washington office as a Deputy Administrative Assistant. Although she apparently performed her duties in a satisfactory manner, Ms. Davis was dismissed on July 31, 1974. Congressman Passman, in dismissing Ms. Davis, noted:

> You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington office, and the

> diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man. I believe you will agree with this conclusion. 571 F.2d at 806, n. 1.

Ms. Davis did not "agree" with Rep. Passman's apparent "conclusion" that male gender is an occupational qualification for any administrative job above secretary. Instead, she commenced this lawsuit seeking re-instatement and back-pay.[2/] Her complaint alleges that, in dismissing her solely because she is a woman, Rep. Passman acted in violation of the guarantee of equal treatment contained in the Due Process clause of the Fifth Amendment.[3/]

Although troublesome procedural questions are raised by Ms. Davis' lawsuit,

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2/ In light of Rep. Passman's retirement, Ms. Davis has abandoned her demand for reinstatement.

3/ Unlike the Fourteenth, the Fifth Amendment contains no explicit guarantee of equal treatment. However, this Court has repeatedly recognized that the Due Process guarantee of the Fifth Amendment subsumes a right to equal treatment which is similar to, if not identical with, the right derived from the Equal Protection Clause of the Fourteenth Amendment. See generally, Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Bolling v. Sharp, 347 U.S. 497 (1954). See also, Schneider v. Rusk, 377 U.S. 163, 168 (1964).

several issues do not appear substantial. First, taking the allegations of her complaint as true, Ms. Davis presents a formidable case on the merits. Overt discrimination in Federal public employment on the basis of sex, in the absence of a bona fide sex based occupational qualification, violates both Title VII, as amended in 1972, and the Fifth Amendment.[4/] Thus, the issues posed by Ms. Davis' attempt to enforce her Fifth Amendment right to equal treatment are issues of remedy rather than issues of right.[5/] Second, Congress has unquestionably granted subject matter jurisdiction to the Federal District courts to entertain petitioner's claim for relief. Since the

4/ Ordinarily, Federal courts would not be called upon to explore the Fifth Amendment claim, since Congress amended Title VII in 1972 to provide an alternative method of vindicating the rights involved. Brown v. General Services Administration, 425 U.S. 820 (1976). Plaintiff, as a non-civil service employee of the Congress, is not covered by the remedial scheme established by 42 U.S.C. § 2000e-16(a). Accordingly, her only source of protection is the Fifth Amendment.

5/ Of course, it remains open to Rep. Passman at trial to establish a sex based occupational qualification for the job. Moreover, Rep. Passman may well be entitled to a good faith defense.

source of petitioner's right is the guarantee of equal treatment embedded in the Fifth Amendment, her claim for relief arises under the Fifth Amendment within the meaning of 28 U.S.C. §1331(a). E.g., Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); Bell v. Hood, 327 U.S. 678 (1946). Unlike the Fourth Amendment privacy-based claims at issue in Bivens, Ms. Davis' equality based claims find no analogue at common law. Thus, it is not even open to respondent to argue, as did the Solicitor General in Bivens, that petitioner's claims arise under state law, with the Federal Constitution acting solely to limit a possible defense based upon government justification or immunity.[6/] Hart, The Relations

6/ The lack of a state common law analogue for Ms. Davis' equality-based claim belies the suggestion of the en banc majority that she possesses an alternative remedy in a state court. Even if Ms. Davis elected to attempt to overrule Tarble's Case, 13 Wall. 397 (1872), by seeking relief against Congressman Passman in a state court, the source of her right would continue to be the Fifth Amendment and she would, thus, be confronted with the identical remedial problems. Surely, the en banc majority did not intend to suggest that a state

(FN 6 continued on next page)

Between State and Federal Law, 54 Colum. L. Rev. 489 (1954); Louisville & Nashville R. R. Co. v. Motley, 211 U.S. 149 (1908). Third, given the clear existence of § 1331(a) jurisdiction,[7] the difficult issue of

(FN 6 continued)

court would be free to provide a remedy for Ms. Davis' Fifth Amendment claim while a Federal court would lack power to provide a remedy. It is true that this Court has required state courts to make effective remedies available to plaintiffs asserting Federal constitutional claims. E.g., Testa v. Katt, 330 U.S. 386 (1947); Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 637 (1960). See also, Poindexter v. Greenhow, 114 U.S. 270 (1894). However, it has never been suggested that state courts possess a greater remedial power in constitutional cases than do their Article III counterparts. Indeed, the assumption has always been quite the contrary. Tarble's Case, supra.

7/ A puzzling, and clearly incorrect, aspect of the decision of the en banc majority is its insistence on dismissing Ms. Davis' claim on jurisdictional grounds. 571 F.2d at 801. Whatever the ultimate resolution of the remedial issues posed by this case, petitioner's claim to equal treatment arises under the Fifth Amendment for jurisdictional purposes. Indeed, no alternative source of legal right exists in a "Federal" equality case. This Court has twice corrected a similar confusion of jurisdiction and remedial power
(FN 7 continued on next page)

the power of an Article III court to protect constitutional rights in the absence of a clear subject matter jurisdictional base is not presented. See generally, Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953), reprinted in Hart & Wechsler's, The Federal Courts and the Federal System (2d.) at 330-360. See also, Oestereich v. Selective Service System Local Board 11, 393 U.S. 233, 243-244 n.6 (1968)(Harlan, J. concurring). Finally, given the traditional nature of the compensatory relief sought by Ms. Davis, this case does not involve the power of a Federal court to evolve non-traditional remedies to redress constitutional violations. E.g., Mapp v. Ohio, 367 U.S. 643 (1961).

Two substantial issues are, however, presented by Ms. Davis' complaint. First,

(FN 7 continued)

in Bell v. Hood, 327 U.S. 678 (1946) and Bivens, supra, only to have it apparently re-appear in the decision of the en banc majority. If dismissal in this case were appropriate at all, it would only be because Ms. Davis' claim is one on which relief cannot be granted. F. R. Civ. Pro. Rule 12(b)(6).

may a Federal District court, in the absence of Congressional authorization, utilize an award of compensatory damages to vindicate the right to equal treatment embedded in the Fifth Amendment? Second, assuming the general availability of a damage remedy in a Fifth Amendment equality case, may such a remedy be invoked against a member of Congress to redress discriminatory staff hiring practices?

A divided panel of the Fifth Circuit initially answered both questions in the affirmative. 544 F2d 865 (5th Cir. 1977). A majority of the Fifth Circuit sitting en banc reversed. 571 F.2d 793 (5th Cir. 1978). The en banc majority considered only the first question, ruling that despite Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), rights sounding in the Due Process clause of the Fifth Amendment[8/] may not be enforced by an award of

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8/ The en banc majority made no attempt to differentiate between equality based Fifth amendment claims, such as Ms. Davis', and procedural or substantive due process claims which may also arise under the Due Process clause of the Fifth Amendment. Obviously, the issues surrounding the implementation of a remedial award in a procedural due process case may differ radically from the remedial concerns in an equality case. Cf. Carey v. Piphus, ___US ___ (1978).

compensatory damages in the absence of Congressional authorization.[9/] Accordingly, the en banc majority found it unnecessary to consider whether Article I, §6 (the speech or debate clause) or general considerations of separation of powers bar a damage award against Rep. Passman.[10/]

9/ The en banc majority appeared to endorse the accepted practice of enforcing the Fifth Amendment's guarantee of equality by injunctive relief despite the absence of explicit Congressional authorization. 571 F.2d at 800. See generally, Bolling v. Sharp, 347 U.S. 497 (1954). No attempt was made to explain why a Federal court possesses inherent equitable remedial power in Fifth Amendment equality cases such as Bolling, but lacks the less intrusive power to award compensatory relief. Bivens v. Six Unknown Agents, 403 U.S. 388, 404 (1971) (Harlan, J., concurring). Given the "back pay" motive of Ms. Davis' demand for relief, it would be possible to characterize her claim as one for equitable, as opposed to compensatory, relief. Back pay in an employment discrimination case has been viewed by many courts as an "equitable" remedy.

10/ Judge Jones concurred on separation of powers grounds. 571 F.2d 801. Judge Roney concurred on the novel ground that only claims grounded in pre-constitutional common law rights may found the basis of a Bivens damage award. 571 F.2d 802. Judges Goldberg and Brown, dissenting, adhered to the view that a damage remedy was available to Ms. Davis.

In ruling that Federal courts lack power to award damages in Fifth Amendment equality cases, the en banc majority seriously misapprehended the remedial powers - and duties - of Article III courts in constitutional cases properly within their subject matter jurisdiction. Amicus believes that whenever a plaintiff invokes a provision of the Federal constitution amenable to private enforcement in a case or controversy properly within the subject matter jurisdiction of an Article III court, the traditional judicial remedies of prohibitory injunction and compensatory damages are presumptively available to the Article III court to enable it to carry out obligations imposed upon the judiciary by Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803). E.g., Bivens v. Six Unknown Agents, 403 U.S. 388 (1971); Jacobs v. United States, 290 U.S. 13 (1933); Ex parte Young, 209 U.S. 123 (1908). See generally, Dellinger, "Of Rights and Remedies": The Constitution as Sword, 85 Harv.L.Rev. 1532 (1972); Hill, Constitutional Remedies, 69 Colum.L.Rev. 1169 (1969); Katz, The Jurisprudence of Remedies, 117 U. Pa.L.Rev. 1 (1968). Moreover, where, as here, a compensatory damage award is the only remedial device capable of vindicating plaintiff's constitutional rights, Article III courts of competent jurisdiction possess inherent

power to invoke the necessary remedy, even in the face of countervailing Congressional intent. Jacobs v. United States, 290 U.S. 13 (1933).[11]

The en banc majority found it unnecessay to rule on the unique separation of power concerns raised by Ms. Davis' complaint. Should this Court agree that the en banc majority was in error concerning the general availability of damage awards in Fifth Amendment equality cases, amicus suggests that the separation of powers issue be remanded to the Fifth Circuit for initial consideration, just as a similar executive immunity issue was remanded in Bivens. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), on remand, 456 F.2d 1339 (2d Cir. Cir. 1972). If, however, this Court elects to consider the separation of powers issue, amicus urges the Court to reject Rep. Passman's Article I, §6 position, since the

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11/ Where more than one remedy is capable of vindicating a constitutional right, amicus agrees that a Congressional judgment as to which remedy should be utilized is entitled to substantial deference. Brown v. General Services Administration, 425 U.S. 820 (1976). In both Bivens and in the instant case, however, no Congressionally sanctioned alternative remedy exists and and a damage award is the only remedy capable of vindicating plaintiff's constitutional rights.

employment of ministerial staff is not core legislative activity within the meaning of Gravel v. United States, 408 U.S. 606 (1972).[12/] Moreover, while Federal courts, as a general matter of separation of powers, should be cautious about interfering with the hiring or firing of policy-making aides to members of Congress, no similar constraint exists in the area of ministerial employees.

12/ See, e.g., Elrod v. Burns, 427 U.S. 347 (1976); see generally Coven, The First Amendment Rights of Policy-Making Employees, 12 Harv. Civ. Rts.-Civ. Lib. Rev. 559 (1977).

I. FEDERAL DISTRICT COURTS POSSESS INHERENT POWER TO INVOKE TRADITIONAL JUDICIAL REMEDIES - INCLUDING AWARDS OF COMPENSATORY DAMAGES - WHEN NECESSARY OR APPROPRIATE TO RESOLVE CLAIMS ARISING UNDER THE GUARANTEE OF EQUAL TREATMENT CONTAINED IN THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT. WHILE, ORDINARILY, SUCH INHERENT REMEDIAL POWER OUGHT NOT BE EXERCISED IN THE FACE OF CONGRESSIONAL DISAPPROVAL, IF CONGRESS HAS FAILED TO PROVIDE A REASONABLY EFFECTIVE ALTERNATIVE REMEDY, FEDERAL COURTS MUST PROVIDE REMEDIES SUFFICIENT TO RESOLVE CONSTITUTIONAL CASES FALLING WITHIN THEIR SUBJECT MATTER JURISDICTION.

Introduction

A generation of law students has grappled with the Hart Dialogue in an effort to explore the nature of Federal judicial protection of constitutional rights. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv.L.Rev. 1362 (1953), reprinted in Hart & Wechsler's The Federal Courts and the Federal System (2d Ed.) at 330-360. What, Professor Hart asked, would happen if Congress provided that one or more substantive provisions of the Constitution, otherwise appropriate for judicial enforcement, were no longer cognizable in Federal court?

To many, the Dialogue, for all its brilliance, appeared highly artificial since, given the unspoken assumptions of our current political structure, Congressional assault on the role of the Federal judiciary as ultimate guardians of our constitutional rights seemed highly improbable. Thus, although legislative threats to curb the constituitonal jurisdiction of the Federal courts have abounded, no jurisdiction-curbing provision has actually become law in recent years. See generally, Pritchett, Congress Versus the Supreme Court 1957-1960 (1961); Elliott, Court Curbing Proposals in Congress, 33 Notre Dame Lawyer 597 (1958); McKay, Court, Congress and Reapportionment, 63 Mich.L. Rev. 255 (1964). Unfortunately, in ruling that a Federal District Court is powerless to award compensatory damages in Fifth Amendment equality cases because Congress has not authorized the remedy, the Fifth Circuit has re-opened the spectre of constitutional rights without remedies. And it has done so, not in response to a Congressional attempt to abolish remedies, compare Ex parte McCardle, 7 Wall 506 (186) but wholly on its own motion, without any Congressional direction whatever. If, as the en banc majority suggests, Congress

may strip an Article III court of the power to invoke traditional judicial remedies necessary for the effectuation of a decision on the merits of a constitutional case properly within its jurisdiction, effective judicial protection of constitutional rights exists solely at the sufferance of Congress. But this is not the law. The decisions of this Court and the remedial tradition of the Federal judiciary compel the conclusion that a Federal District Court retains discretion to utilize traditional remedies - including compensatory damages - whenever they are deemed necessary to effectuate a decision on the merits of a constitutional case properly within its subject matter jurisdiction. 13/

13/ Given the existence of §1331(a) jurisdiction, this case does not pose the most difficult issue posed by the Hart Dialogue - the impact of Congressional withdrawal of subject matter jurisdiction on a court's ability to enforce constitutional rights.

A. The Duty of a Federal Court to Adjudicate a Constitutional Case Within Its Subject Matter Jurisdiction

The essence of the power of an Article III court to adjudicate the constitutionality of the acts of coordinate branches turns on its duty to resolve cases or controversies by deciding which of two conflicting sources of legal right must be awarded precedence. Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803); United States v. Richardson, 418 U.S. 166, 180 (1974) (Powell, J., concurring). Without the capacity to provide effective relief to the litigants before the Court, however, the theory of Marbury is undermined. Cf. Eastern Kentucky Welfare Rights Organization v. Simon, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975). Since the Court's initial power to resolve the merits flows, under Marbury, from a court's responsibility to service litigants seeking the resolution of a given case or controversy, and since Congress has directed the Court to entertain the case or controversy by vesting the Court with subject matter jurisdiction, failure to provide a necessary remedy strikes at the heart of the judicial function and cannot be reconciled with Chief Justice Marshall's

interpretation of judicial power and responsibility. Once Congress directs an Article III court to assume jurisdiction over a constitutional case - thus triggering a classic Marbury confrontation - neither Congress, nor the Court, may decline to utilize traditional judicial remedies which are necessary to effectuate a decision on the merits. Jacobs v. United States, 290 U.S. 13 (1933). Separation of powers is a two-way street. Just as it cautions against judicial interference in the legislative sphere (see infra at 30-35), so it insulates the judicial sphere from legislative encroachment. The decision of the en banc majority to "defer" to the legislature by declining to afford a plaintiff the only remedy capable of vindicating her constitutional claim is an abdication of the Court's Article III responsibilities.14/

14/ Amicus suggests that the clearly erroneous attempt of the en banc majority to couch its dismissal in jurisdictional terms is an attempt to avoid the logic of Marbury. Only if the en banc majority can avoid being vested with subject matter jurisdiction can it justify withholding the only effective remedy.

B. Federal Courts and the Exercise of Traditional Remedial Powers in Constitutional Cases

Prior to the grant of Federal question jurisdiction in 1875, Federal courts had little or no occasion to speculate on their duty to provide remedies in constitutional cases properly within their subject matter jurisdiction. However, even before the adoption of the Constitution, common law courts had traditionally utilized compensatory damage awards to vindicate interests which we now regard as constitutionally protected. E.g., Ashby v. White, 92 Eng. Rep. 126 (K.B. 1703); Entick v. Carrington, 19 Howell St. Tr. 1029 (1765). The enactment of general federal question jurisdiction in 1875, coupled with an expansive reading of the term "person" in the Fourteench Amendment to include business corporations, precipitated a barrage of Federal litigation seeking to enforce substantive due process claims against government regulatory bodies. This Court routinely appoved requests for equitable relief in such cases, basing jurisdiction on the predecessor to 28 U.S.C. §1331(a) and the power to grant equitable relief directly on Section 1 of the Fourteenth Amendment.

E.g., Ex parte Young, 209 U.S. 123 (1908).[15/] See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Brown v. GSA, supra, 425 U.S. at 826. The tradition of routinely utilizing equitable remedies in constitutional cases in the absence of Congeessional authorization is now so entrenched that even the en banc majority assumed that injunctive relief would have been available in this case were Representative Passman currently a member of Congress. Moreover, in the years following the establishment of Federal question jurisdiction, this Court approved the utilization of compensatory damage awards by Federal District Courts in constitutional cases in the absence of explicit Congressional authorization on at least two occasions. Wiley v. Sinkler, 179 U.S. 58 (1900); Swafford v. Templeton, 185 U.S. 487

15/ Modern analysis would view the cause of action for equitable relief in Ex parte Young, 209 U.S. 123 (1908), as based on 42 U.S.C. §1983. However, at the time Ex parte Young was decided, the Civil Rights Act of 1871 was not deemed to apply to property rights. E.g., Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900).

(1902). In addition, in Jacobs v. United States, 290 U.S. 13 (1933), this Court suggested that the remedial power of Federal courts in constitutional cases was beyond the reach of Congress. Finally, the Federal courts have developed a tradition of utilizing both equitable relief and compensatory damages to enforce statutory rights in the absence of explicit Congressional authorization. E.g., J. I. Case & Co. v. Borak, 377 U.S. 426 (1964).[16/] Thus, prior to 1971, this Court had repeatedly approved a broad inherent power in the Federal district courts to invoke

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16/ Two significant differences exist in deciding whether to utilize traditional remedies in a statutory as opposed to a constitutional case. First, in a statutory case, a Federal court must often make a threshold determination whether the statutory rights are intended to be privately enforceable at all. E.g., Cort v. Ash, 422 U.S. 66 (1975). In the vast bulk of constitutional cases, it is assumed that constitutional rights create privately enforceable causes of action. Second, in a statutory case, the overriding issue is whether the use of a given remedy would contravene Congressional intent, since the substantive rights are themselves created and defined by Congress. In a constitutional case, however, the subtantive rights transcend the intent of Congress.

traditional judicial remedies if necessary and appropriate to the vindication of both statutory and constitutional rights. In Bivens v. Six Unknown Agents, supra, this Court unequivocally reiterated the view that Federal courts may utilize compensatory damages to vindicate constitutional rights in cases within their subject matter jurisdiction. In Bivens, Mr. Justice Brennan, writing for the Court, ruled that Webster Bivens' claim for damages caused by an allegedly unconstitutional search and seizure arose under the Fourth Amendment rather than state tort law. Accordingly, he ruled that Bivens' claim was properly cognizable under § 1331(a). Once Bivens' Fourth Amendment claim was seen to fall within the "arising under" subject matter jurisdiction of the District Court, Mr. Justice Brennan, writing for the Court, held that Federal judges possessed the inherent remedial power to invoke traditional remedies, including damages, needed to vindicate the constitutional right at stake. Mr. Justice Harlan, in concurrence, followed a similar line of reasoning in discussing the factors which should instruct District Judges whether to exercise their inherent remedial powers. It is, amicus believes, a fair reading of

both Mr. Justice Brennan's majority opinion and Mr. Justice Harlan's concurrence that once subject matter jurisdiction over an otherwise justiciable constitutional case or controversy is found to exist, Federal district courts are presumptively armed with the traditional judicial remedies of prohibitory injunction and compensatory relief to effectuate their decisions on the merits. Of course, as both Mr. Justice Brennan and Mr. Justice Harlan noted, the presumptive availability of a damage remedy to vindicate a constitutional right may be rebutted under two narrowly circumscribed circumstances.

First, Congress may have prescribed a remedial scheme which is inconsistent with an award of damages, but which appears to provide a reasonable opportunity to the plaintiff to vindicate his or her constitutional rights. Brown v. General Services Administration, 425 U.S. 820 (1976). Amicus agrees that when Congress has determined that one of two alternative methods of constitutional enforcement is preferable, Federal courts should exercise caution in rejecting the remedial judgment of Congress. However, as Mr. Justice Brennan and Mr. Justice Harlan were careful to note, the Congressional alternative must afford a

plaintiff in a constitutional case a reasonable opportunity to vindicate his or her rights.[17/] Where, as here, Congress has provided no alternative remedy and where it is conceded that damages are the sole remedial device capable of vindicating petitioner's Fifth Amendment rights, the traditional remedial power of the Federal court cannot be trumped by Congressional failure to provide for a damage award. Jacobs v. United States, 290 U.S. 13 (1933).

Second, the nature of the substantive right at stake may be inappopriate for enforcement by a given private remedy. Certain rare constitutional provisions, such as the Article I, Section 9 ban on titles of nobility, may not be amenable to private enforcement at all;[18/] while certain other

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17/ In Bivens, Mr. Justice Harlan took pains to demonstrate that the alternative Fourth Amendment remedies of the exclusionary rule and injunctive relief would not vindicate Bivens' rights. 403 U.S. at 409-410. In the instant case, it is conceded that no alternative remedy is available to Ms. Davis.

18/ The decision as to whether a given constitutional provision is amenable to private enforcement is often expressed as a standing question. Compare Flast v. Cohen, 392 U.S. 83 (1968), with United States v. Richardson, 418 U.S. 166 (1974). Such a decision is not, strictly speaking, a decision on remedies, but rather is a decision on the scope of

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constitutional provisions, although privately enforceable, may not lend themselves to a damage remedy. Thus, Mr. Justice Harlan suggested, difficulty in ascertaining judicially manageable standards to test causation and measure the quantum of damages would argue against the recognition of a damage remedy in a certain constitutional case. In Bivens, the Fourth Amendment was correctly perceived as conferring judicially enforceable rights of private parties, and the experience of the common law courts in administering analogous compensatory damage remedies was perceived as easing problems of causation and valuation. In the instant case, the guarantee of equal treatment invoked by Ms. Davis is a quintessentially private right. Moreover, the causation and valuation issues raised by a claim in back pay are trivial compared with the issues previously deemed manageable in Bivens. Thus, neither of the principal factors which would caution against the recognition of a damage claim are present in Fifth Amendment equality cases.

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the substantive provision involved. Although such a decision is relatively rare in a constitutional context, it is routine in deciding whether to imply a private damage action in statutory cases. Compare J. I. Case & Co. v. Borak, 377 U.S. 426 (1964), with Cort v. Ash, 422 U.S. 66 (1975).

Nor are the subsidiary factors of caseload or federalism discussed in Bivens and by the en banc majority below either present or persuasive. The recognition of a damage remedy in Fifth Amendment equality cases will not substantially affect the caseload of the Federal courts since, to the extent the Fifth Amendment claims are brought as common law tort or contract claims in state court, they are subject to removal and will be heard in Federal court in any event. 28 U.S.C. §1442(a)(1). Moreover, the fact that a Federal injunctive remedy is available means that the vast bulk of Fifth Amendment equality suits will continue to be brought in Federal court seeking injunctive relief, whether or not a damage remedy is also available.[19/] Finally, it is, to say the least, questionable practice to deny constitutional litigants access to a remedy necessary to vindicate their constitutional rights

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19/ Indeed, failure to afford a Federal damage remedy will exacerbate the caseload problem by encouraging a bi-furcation of the case into a Federal action for injunctive relief and a state action for damages, which will ultimately find its way to Federal court via §1442(a)(1) removal.

because too many constitutional claims may exist.[20/] As a second subsidiary argument against recognizing a damage remedy, the en banc majority launches a curious federalism argument which suggests that it is more appropriate for Federal officials who have unconstitutionally injured persons while acting under color of Federal law to be sued in state, rather than Federal, court. Of course, given removal jurisdiction, even if the en banc majority were successful in forcing Federal constitutional claims against Federal officials into state court in the first instance, the claims would inevitably make their way into Federal court. 28 U.S.C. §1442(a)(1). Moreover, apart from a blind and unexplained preference for state court adjudication, it is unclear what federalism values would be served by asking state judges to sit in judgment of Federal officials who are alleged

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20/ The floodgate argument marshalled by by en banc majority is, in large part, a self-inflicted prophecy which flows from its insistence on viewing the Due Process Clause as an indivisible unit. If one lumps procedural due process, substantive due process and Fifth Amendment equality into a single mass, as does the en banc majority, it is easier to speculate about floodgates. If, however, one focusses solely on Fifth Amendment equality claims, the volume of cases involved is far smaller.

to be acting in violation of the Federal constitution.

Thus, when one compares the Fourth Amendment claim advanced in Bivens with the equality-based Fifth Amendment claim advanced by Ms. Davis in this case, no principled basis exists for permitting Federal courts to grant damages in a Fourth Amendment context, but forbidding them from granting damages in a Fifth Amendment equality case.

C. The Exercise By the Lower Federal Courts of Remedial Power to Award Compensatory Damages in Constitutional Cases in the Wake of Bivens.

Amicus has argued that the implications of Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803) and the decisions of this Court[21/] compel the conclusion that the Federal courts are presumptively empowered to award compensatory damages in constitutional cases falling within their subject matter jurisdiction. In the wake of Bivens v. Six Unknown Agents, supra, the lower

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21/ Ex parte Young, 209 U.S. 123 (1908); Jacobs v. United States, 290 U.S. 13 (1933); Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

Federal courts have consistently recognized the existence of such presumptive remedial authority. See generally, Lehmann, Bivens and its Progeny, 4 Hastings Const. L. Q. 531 (1977) and the cases collected there at 571 F.2d 807, n. 6. Thus, whether a constitutional plaintiff has asserted a claim under the First Amendment, the Fifth Amendment, the Sixth Amendment, the Eighth Amendment, the Thirteenth Amendment, or the Fourteenth Amendment, the lower Federal courts have consistently recognized a presumptive power to award damages in constitutional cases within their subject matter jurisdiction.[22/] Indeed, the only circumstances in which the presumptive availability of a damage remedy has been rebutted have been those situations where Congress has acted to provide an alternative, equally effective, remedial structure. E.g., Brown v. General Services Administration, 425 U.S. 820 (1976); Kostka v. Hogg, 560 F.2d 37 (1st Cir.

22/ For a compilation of post-Bivens lower court decisions concerning remedies in causes of action founded directly upon violations of constitutional rights, see Appendix, infra, at 37-42.

1977); McDonald v. State of Illinois, 557 F.2d 596 (7th Cir. 1977); Mahone v. Waddle, 564 F.2d 1018 (3rd Cir. 1977). In the absence of Congressionally created alternative, and equally effective, remedies, however, Federal courts, with the unfortunate exception of the en banc majority below, have systematically exercised their presumptive remedial power to award compensatory damages in constitutional cases.

II. SINCE THE EN BANC MAJORITY FAILED TO ADDRESS THE UNIQUE SEPARATION OF POWERS ISSUES POSED BY AN EXERCISE OF INHERENT REMEDIAL POWER TO AWARD DAMAGES AGAINST A MEMBER OF CONGRESS FOR HAVING ENGAGED IN UNCONSTITUTIONAL HIRING PRACTICES, THIS COURT SHOULD REMAND THE ISSUE FOR INITIAL CONSIDERATION. IF THE COURT ELECTS TO CONSIDER THE SEPARATION OF POWERS ISSUE, IT SHOULD A) RULE THAT A DAMAGE AWARD IS NOT BARRED BY THE SPEECH OR DEBATE CLAUSE, AND B) REMAND FOR A FACTUAL HEARING ON THE PRECISE NATURE OF MS. DAVIS' JOB TO DETERMINE WHETHER GENERALIZED NOTIONS OF SEPARATION OF POWERS SHOULD PRECLUDE JUDICIAL REVIEW OF REP. PASSMAN'S ACTIONS.

As amicus has argued, Federal courts possess a presumptive general remedial power to award damages against Federal defendants who have violated the guarantee of equal treatment contained in the Fifth Amendment. Thus, were Rep. Passman an official of the Department of Agriculture charged with racially discriminatory activity, no serious obstacle would exist to

an award of compensatory damages.[23] However, a decision to invoke a damage remedy against a member of Congress arising out of allegedly unconstitutional staff employment policies raises unique and delicate separation of powers concerns. Given its view that no damage remedy exists in a Fifth Amendment equality case, the en banc majority failed to address explicitly the unique separation of powers issues posed by Ms. Davis' complaint.[24] Accordingly, if this Court agrees that, as a general matter, a damage remedy would be available in a Fifth Amendment equality case, it should remand to the Fifth Circuit for initial consideration of the legislative "immunity" issue, just as it remanded

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23/ Assuming that Congress had not established an alternative set of remedies equally effective in vindicating plaintiff's Fifth Amendment rights. See supra at 22-23.

24/ Both the majority and dissent of the initial panel considered the issue. 544 F.2d 865, 877-881, 882 (5th Cir. 1977). En banc, Judge Jones re-stated his separation of powers position and concurred with the en banc majority. Judges Goldberg and Brown, in dissent, simply referred to their initial panel opinion.

a similar executive "immunity" issue to the Second Circuit in Bivens. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), on remand 456 F.2d 1339 (2d Cir. (1972).

If, however, this Court chooses to consider whether Congressman Passman's status blocks the assertion of a damage remedy, amicus urges the Court to recognize, first, that discriminatory employment practices are not insulated from judicial review by the "speech or debate" clause and, second, that where ministerial, non-policy-making jobs are at issue, no generalized principle of separation of powers precludes judicial enforcement of the Fifth Amendment against Congressmen. As Powell v. McCormack, 395 U.S. 486 (1969) and Bond v. Floyd, 385 U.S. 116 (1966) illustrate, neither Article I, § 6, nor generalized notions of separation of powers and legislative immunity preclude the Federal judiciary from the vigorous enforcement of constitutional rights.

Prior to 1972, the speech or debate clause was often perceived as granting a "personal" immunity to members of Congress which insulated them from judicial

scrutiny.[25] However, in United States v. Brewster, 408 U.S. 501 (1972) and Gravel v. United States, 408 U.S. 606 (1972), this Court re-interpreted the speech or debate immunity to be "functional" rather than "personal." As a functional immunity, it protects both a Congressman and his staff so long as they are engaged in core legislative activity, but it excludes even a Congressman himself when his activities fall outside core legislative activity. This Court has ruled that the "functional" speech or debate privilege does not insulate a member of Congress from judicial review of (a) contacts with the executive

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25/ The speech or debate clause has been before this Court on nine occasions. Kilbourn v. Thompson, 103 U.S. 168 (1880); Tenney v. Brandhove, 341 U.S. 367 (1951)(state legislators enjoy an analogous common law immunity); United States v. Johnson, 383 U.S. 169 (1966); Dombrowski v. Eastland, 387 U.S. 28 (1967); Powell v. McCormack, 395 U.S. 486 (1969); United States v. Brewster, 408 U.S. 501 (1912); Gravel v. United States, 408 U.S. 606 (1972); Doe v. McMillan, 412 U.S. 306 (1973); and Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). See also, McAdams v. McSurely, No. 76-1621, June 26, 1978 (cert. dismissed); United States v. Helstoski, No. 78-349 (cert. granted, Dec. 11, 1978).

branch on behalf of constituents;[26] (b) public distribution of Congressional reports;[27] and (c) the private republication of material assembled by members of Congress or their aides.[28] Similarly, employment decisions involving ministerial staff positions do not involve a member of Congress in core legislative activity and, thus, are not insulated from judicial scrutiny by the speech or debate clause.

Similarly, generalized notions of separation of powers should not inhibit a Federal court from invoking its general remedial powers to award damages against Rep. Passman, if he is found liable on the merits. So long as the employment decision involved was made in connection with a ministerial, non-policy-making position, Rep. Passman's interests in

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26/ United States v. Brewster, 408 U.S. 501 (1972).

27/ Doe v. McMillan, 412 U.S. 306 (1973).

28/ Gravel v. United States, 408 U.S. 606 (1972).

avoiding judicial review are no different from those of any Federal official. Only when the job at issue affects his performance as a legislator in a policy-making sense can Rep. Passman's legislative, as opposed to bureaucratic, interests be said to be affected. It is, of course, impossible at this stage of the litigation to know whether Ms. Davis' job was ministerial or policy-making. Thus, the matter should be remanded for trial.

CONCLUSION

The judgment of th en banc majority of the Fifth Circuit should be reversed and the case remanded to the Fifth Circuit for initial consideration of the unique separation of powers issue posed by this case. In the alternative, the judgment of the en banc majority of the Fifth Circuit should be reversed and the matter remanded to the District Court for trial on the merits.

Dated: New York, New York
December 14, 1978

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A P P E N D I X

Cases Concerning Compensatory Remedies for Violations of Constitutional Rights

A. First Amendment cases implying damages remedy include:

Dellums v. Powell, 566 F.2d 167, 195 (D.C. Cir.);

Paton v. LaPrade, 524 F.2d 862, 869-70 (3rd Cir. 1975);

Yiamouyiamis v. Chemical Abstracts Service, 521 F.2d 1392, 1393 (6th Cir. 1975);

Gray v. Union County-Intermed. Educ. Dist., 520 F.2d 803, 805 (9th Cir. 1975) (§1331 jurisdiction upheld);

Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3d Cir. 1974), vacated on other grounds, 421 U.S. 983 (1975) (§1331 jurisdiction upheld);

Writers Guild of America, West, Inc. v. FCC, 423 F.Supp. 1064, 1088 (C.D. Cal. 1976);

Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976);

Jihaad v. Carlson, 410 F.Supp. 1132, 1133 (E.D. Mich. 1976);

Butler v. United States, 365 F.Supp. 1035 (D. Haw. 1973);

Revis v. Laird, 391 F.Supp. 1133 (E.D. Cal. 1975).

But see,

Neeley v. Blumenthal, ___ F.Supp. ___ (D.D.C. 1978) (slip opinion, July 6, 1978);

Schofield v. County of Volusia, Fla., 413 F.Supp. 908 (M.D. Fla. 1976);

Moore v. Schlesinger, 384 F.Supp. 163 (D. Colo. 1974);

Smothers v. CBS, 351 F.Supp. 622 (C.D. Cal. 1972).

B. Fifth Amendment cases implying damages remedy include:

Loe v. Armstead, 582 F.2d 129 (4th Cir. 1978);

Green v. Carlson, 581 F.2d 669 (7th Cir. 1978) (implicit sanction of damages cause of action);

Bennett v. Campbell, 564 F.2d 329, 332 (9th Cir. 1977);

Meiners v. Moriarty, 563 F.2d 343 (7th Cir. 1977) (implicit sanction of cause of action for damages);

Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977);

Lewis v. D. C. Department of Correction, 533 F.2d 710 (D.C. Cir. 1976) (implicit);

Dry Creek Lodge v. United States, 515 F.2d 926, 933 and n. 5 (10th Cir. 1975);

Apton v. Wilson, 506 F.2d 83, 93 (D.C. Cir. 1974) (implicit);

States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1156-57 (4th Cir. 1974);

Sullivan v. Murphy, 478 F.2d 938, 963 (D.C. Cir. 1973);

United States ex rel Moore v. Koelzer, 457 F.2d 893 (3rd Cir. 1972);

Bethea v. Reid, 445 F.2d 1163, 1165 (3rd Cir. 1971) (implicit);

McKenzie v. Calloway, 456 F.Supp. 590, 595 (E.D. Mich. 1978);

Christie v. Marston, 451 F.Supp. 1142 (N.D. Ill. (1978);

De Malherbe v. International U. of Elev. Constructors, 449 F.Supp. 1335 (N.D. Cal. 1978) (implicit);

Fayerweather v. Gell, 447 F.Supp. 913 (M.D. Pa. 1978);

Lofland v. Meyers, 442 F.Supp. 955 (S.D.N.Y. 1977);

Hill v. McMartin, 432 F.Supp. 99 (E.D. Mich. 1977);

Eisenberg v. Matthews, 420 F.Supp. 1274 (E.D. Pa. 1976) (semble);

Patmore v. Carlson, 392 F.Supp. 737 (E.D. Ill. 1975);

Blassingame v. United States Attorney General, 387 F.Supp. 418 (S.D.N.Y. 1975);

Revis v. Laird, 391 F.Supp. 1133, 1338-39 (E.D. Cal. 1975);

Shaffer v. Wilson, 383 F.Supp. 554 (D. Colo. 1974);

United States ex. rel. Harrison v. Place, 380 F.Supp. 107 (E.D. Pa. 1974);

Butler v. United States, 365 F.Supp. 1035 (D. Haw. 1973);

James v. United States, 358 F.Supp. 1381, 1386-87 (D.R.I. 1973) (dicta);

Johnson v. Aldredge, 349 F.Supp. 120 (M.D. Pa. 1972) (upholding §1331 jurisdiction).

But see,

Hernandez v. Lattimore, 454 F.Supp. 163 (S.D.N.Y. 1978);

Jones v. United States, 401 F.Supp. 168 (E.D. Ark);

Archuleta v. Calloway, 385 F.Supp. 384 (D. Colo. 1974);

Davidson v. Kane, 337 F.Supp. 922 (E.D. Va. 1972) (dictum).

C. Sixth Amendment cases implying damages remedy include:

Berling Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976).

D. Eighth Amendment cases implying damages remedy include:

Green v. Carlson, 581 F.2d 669 (7th Cir. 1978);

Patmore v. Carlson, 392 F.Supp. 737 (E.D. Ill. 1975);

Blassingame v. United States Attorney General, 387 F.supp. 418 (S.D.N.Y. 1975);

Waltenberg v. New York City Department of Correction, 376 F.Supp. 41 (S.D.N.Y. 1974) (semble);

Walker v. McCune, 363 F.Supp. 254 (E.D. Va. 1973) (semble);

James v. United States, 358 F.Supp. 1381 (D.R.I. 1973).

But see,

Hernandez v. Lattimore, 454 F.Supp. 765 (S.D.N.Y. 1978) (FTCA was alternate remedy).

E. Thirteenth Amendment cases implying damages remedy include:

Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975);

Maybanks v. Ingraham, 378 F.Supp. 913 (E.D. Pa. 1974).

F. Fourteenth Amendment cases implying damages remedy include:

Jones v. City of Memphis, ___ F.2d ___ (6th Cir. 1978) (slip opinion Sept. 19, 1978);

Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978);

Pitrone v. Mercadante, 572 F.2d 98 (3rd Cir. 1978) (§1331 jurisdiction upheld);

Gagliardi v. Flint, 564 F.2d 112 (3rd Cir. 1977) (§1331 jurisdiction upheld);

Owen v. City of Independence Missouri, 560 F.2d 925, 933 (8th Cir. 1977) (upholds §1331 jurisdiction but only grants equitable remedy);

Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975);

Fitzgerald v. Porter Mem. Hospital, 523 F.2d 716, 718-19 n. 7 (7th Cir. 1975) (implicit sanction of damages remedy);

Hostrop v. Board of Junior College District No. 515, 523 F.2d 569 (7th Cir. 1975)(dicta);

Sands v. Union County, Tenn., 455 F.Supp. 738, 740 (E.D. Tenn. 1978);

Miller v. Board of Education of City of Lincoln, 450 F.Supp. 106 (S.D. W.Va. 1978) (but granting only equitable relief);

Murray v. Murphy, 441 F.Supp. 120 (E.D. Pa. 1977);

Newborn v. Morrison, 440 F.Supp. 623 (S.D. Ill. 1977) (§1331 jurisdiction upheld);

Sedule v. Capitol School District, 425 F.Supp. 552 (D. Del. 1976) (§1331 juris. upheld);

Sanabria v. Village of Monticello, 424 F.Supp. 402 (S.D.N.Y. 1976);

6th Camden Corp. v. Evesham Tp., Burlington Cty. 420 F.Supp. 709 (D.N.J. 1976);

Behan v. City of Dover, 419 F.Supp. 562 (D. Del. 1976);

Sheets v. Stanley Community School District No. 2, 413 F.Supp. 350 (D.N. Da. 1975);

Collum v. Yurkovich, 409 F.Supp. 557 (N.D. Ill. 1975) (upholding §1331 jurisdiction);

Panzarella v. Boyle, 406 F.Supp. 787 (D.R.I. 1975);

Williams. v Brown, 398 F.Supp. 155 (N.D. Ill. 1975);

Maybanks v. Ingraham, 378 F.Supp. 913 (E.D. Pa. 1974);

Dahl v. City of Palo Alto, 372 F.Supp. 647 (N.D. Cal. 1974) (upholding §1331 juris.);

Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978) (unlawful taking of property).

But see,

Perzanowski v. Salvio, 369 F.Supp. 223 (D. Conn. 1974);

Cale v. Covington, ___ F.2d ___ (4th Cir. 1978) (slip opinion, November 3, 1978);

Molina v. Richardson, 578 F.2d 846 (9th Cir. 1978);

Washington v. Brantley, 352 F.Supp. 559 (M.D. Fla. 1972);

Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977).

G. Cases implying Bivens-type of action for the violation of "any constitutional right" include:

Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976) (dicta);

Adekav v. New York City, 431 F.Supp. 812 (S D.N.Y. 1977);

Gardels v. Murphy, 377 F.Supp. 1389, 1398 (N.D. Ill. 1974);

Rodriguez v. Barcelo, 358 F.Supp. 43, 48 (D.P.R. 1973) (dictum);

Saffron v. Wilson, 70 F.R.D. 51 (D.D.C. 1975).